NO. 85-5348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DAVID BUCHANAN, Petitioner,

v.

COMMONWEALTH OF KENTUCKY, Respondent.

On Writ Of Certiorari To The
Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF, RESPONDENT'S SUPPLEMENTAL BRIEF AND BRIEF OF AMICI CURIAE

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55pp

TABLE OF CONTENTS

TABLE OF POINTS AND AUTHORITIES

a) Cases

b) Authorities

JURISDICTION

i) First Amendment and Equal Protection Clause

Respondent claims, as to argument I, that this Court "lacks jurisdiction to consider the various grounds which are extraneous to the question presented in the petition" [Respondent's Brief, RB 6]. Kentucky's objection appears to go more to Buchanan's choice of subheadings than anything else. Surely the equal protection aspects [subsection H, Buchanan's Brief, BB 33-34] and the interests of the excluded citizen/jurors [subsection G, BB 32-33] are important public policy considerations. Lockhart v. McCree, 106 S.Ct. 1758, 1766 (1986) and 106 S.Ct. at 1779 (dissent), say so. However, these arguments hardly change the basic nature of the claim before the Court.

"The statement of a question presented will be deemed to comprise every subsidiary

question fairly included therein... U.S.SUP.CT.RULE 21.1(a).[1] Admittedly, Buchanan's analysis of the many sides of this problem is deeper here than in the Kentucky Supreme Court. Hopefully, that is as it should be. Those aspects of "death-qualification" briefed here which respondent refuses to discuss are "fairly included" within Buchanan's consistent and full-fledged attack on the practice below.

This is hardly a situation where an appellant or petitioner raises an issue never discussed below.[2] The cases cited by appellee are

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[1]All emphasis added unless otherwise indicated.

[2]Respondent concedes that petitioner's theories (even equal protection) were presented to the trial judge [RB 3 n.2]. The Commonwealth does quibble over subheading "G" of petitioner's brief - focusing on the citizen/juror's right not to be excluded [BB 32]. Since this First Amendment
(footnote continued)

inapposite. See, e.g., Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) ["In view of the failure to raise the issue he presents here in any way below..."]. In fact, Kentucky cites Lear, Inc. v.

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analysis is simply the flip-side of the Sixth Amendment "cross-section" argument and since Buchanan did complain at trial about capital trial jurors who are "arbitrarily single[d] out" [Joint Appendix, A 6], all of the points made here were argued in the trial court.

On appeal Kentucky stated: "Such persons [WE's]... have not been singled out...for special treatment" [Commonwealth's Brief below, CB 20]. Under Kentucky law the prosecution may preserve issues for review even if the defendant doesn't. Bruce v. Commonwealth, 581 S.W.2d 8, 9 (Ky. 1979) [the prosecutor's motion "fairly present(ed)" the issue]. This Court takes a similar position. Batson v. Kentucky, 106 S.Ct. 1712, 1716 n.4 (1986). Anyway, the Kentucky Supreme Court specifically rejected the claim that WE's have been "singled out...for special treatment." Buchanan v. Commonwealth, 691 S.W.2d 210, 212 (1985) [A 82].

Whether these various points are viewed as a First or Sixth Amendment analysis, a due process or equal protection claim, the essential points were made below - at trial and on appeal.

Adkins, 395 U.S. 653, 662 n.10 (1969), where respondent's essential argument was rejected:

> We clearly have jurisdiction to consider whether this decision is wrong. In doing so, we have the duty to consider the broader implications of Lear's contention, and vindicate, if appropriate, its claim to relief on somewhat different grounds than it chose to advance below...

This Court's "jurisdiction does not depend on citation to book and verse." Eddings v. Oklahoma, 455 U.S. 104, 113-14 n.9 (1982). See also Taylor v. Kentucky, 436 U.S. 478, 482 n.10 (1978), where an objection invoking "fundamental principles of judicial fair play" was deemed sufficient to alert the trial judge to a Fourteenth Amendment due process claim.[3]

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[3]Of course, the individual state's procedures must be considered in deciding what is adequate. The Kentucky Supreme Court had before it a trial record containing all the specific points made here in Buchanan's brief (i.e., equal protection...jurors being "singled out", specific objection to the manner of "death-qualification" in this case). This is sufficient considering Buchanan's per se attack on the practice on appeal. See Beck v. Alabama, 447 U.S. 625, 630-31

(footnote continued)

"Obviously there are instances in which 'the ultimate question for disposition'...will be the same despite variations in the legal theory...urged in its support..." Picard v. Connor, 404 U.S. 270, 277-78 (1971).

In any event, it is certain that the Kentucky Supreme Court considered and rejected each and every aspect of the problem briefed here. The opinion cites numerous "death-qualification" cases which discuss these theories, especially Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980). Buchanan v. Commonwalth, 691 S.W.2d 210, 212 (Ky. 1985) [A 81].

ii) "Death-Qualification" in this Case

Respondent also ignores Buchanan's complaint [subsection J, BB 35-39] that the particular "death-qualification" process employed in this case was itself unconstitutional...in

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n.6 (1980) where the issue in question was dropped from the final state appellate brief. This Court concluded that the petitioner "did present his federal claims in some fashion to the Alabama Supreme Court..." Indeed, under Kentucky law the Court may notice an error in the record and reverse on its own initiative. KY. RULE CRIM. PROC. 9.26. See, e.g., Johnson v. Commonwealth, 609 S.W.2d 360 (Ky. 1980).

four ways: 1) it focused only on the death penalty and not at all on relevant punishment options, 2) the potential jurors were generally not asked if they could lay aside personal feelings and follow the law, 3) a broader basis was used to exclude veniremen than permissible, and 4) the "process effects" were enhanced since petitioner did not face the death penalty.

Respondent again concedes that all of these points were specifically made before the trial judge who ruled that an automatic objection is registered for both defendant's when one counsel objects.[4] This is a legitimate procedure in Kentucky. Recently, in McQueen v. Commonwealth, ___ S.W.2d ___, ___ (Ky. 1986), the Kentucky Supreme Court reaffirmed this principle, approving the decision of a "trial court" allowing "any benefit arising from the pretrial motion of one party [to] inure equally to the other co-defendant."

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[4]Sometimes this was only Buchanan's lawyer [A 33].

On appeal, co-defendant Stanford[5] based his complaints on these four specific flaws in the "death-qualification" procedure used by the trial judge. These complaints are still pending before the Kentucky Supreme Court in Stanford's appeal. Thus, all of these sub-arguments are, and were, before the Kentucky Supreme Court. The trial judge's specific ruling, and Kentucky practice, permits Buchanan to rely on these complaints as raised in his co-appellant's brief.[6]

More to the point, Buchanan phrased the argument in the Kentucky Supreme Court **the only way he could.** Both the prosecutor and the trial judge stated that Buchanan was "not involved in...death-qualification" [A 28], implying he

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[5]See Stanford's brief at 9-11, 24-52 and Kentucky's response at 4-6, 16-26. Oral argument was held on August 29, 1986.

[6]The prosecutor, whose name appears on respondent's brief in this Court, specifically agreed to this procedure: "I think that would be proper..." [A 28].

therefore had no standing to object (although he did) to the exclusion of particular jurors or any need to be concerned with how the procedure was effectuated.

In Kentucky, and elsehwere, "objections to questions pertaining to the death penalty on voir dire...are mooted when the verdict is guilty and the sentence is life..." Van Cleave v. State, 598 S.W.2d 65, 69 (Ark. 1980). "Witherspoon...does not invalidate the guilty verdict." Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970). Bumper v. North Carolina, 391 U.S. 543, 546 (1968). "Since no death sentence was imposed...the appellant lacks standing..." to complain about "death-qualificaton." Herman v. State, 396 So.2d 222, 228 (Fla.App. 1981). Accord, e.g., Brinks v. State, 217 So.2d 813, 815 (Ala. 1968); Clark v. Smith, 164 S.E.2d 790, 793 (Ga. 1968). This is true even where jurors are concededly excused in violation of Witherspoon and, as in Kentucky, where a new jury must be impaneled anyway to resentence the defendant. Meyer v. Commonwealth, 472 S.W.2d 479, 481-82 (Ky. 1971).

Thus, the only way Buchanan could frame his argument on appeal is to attack the use of

any death-qualification[7] in his case. This he did, and did well, below. Therefore, this Court has jurisdiction to entertain all of petitioner's complaints, both general and specific, regarding "death-qualification."

ARGUMENTS

I.

PURGING 20% OF THE JURY PANEL (7 FOR CAUSE, 4 BY PEREMPTORY) DUE TO RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT VIOLATES THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN ONE DEFENDANT IN A JOINT TRIAL DOES NOT FACE THE DEATH PENALTY.

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[7]The point about peremptory challenges is not, as misinterpreted by respondent, some type of belated Batson complaint. The peremptories are relevant for the obvious reason that absent "death-qualification", the prosecutor couldn't have used his peremptories to exclude these people, at least because of their views on the death penalty. No independent claim is made here that in a capital case a prosecutor cannot use his peremptories as he sees fit, for non-racist reasons.

A. WHY MCCREE DOESN'T CONTROL

i) Impartiality on Sentence

Petitioner must repeat his essential claim. "Death-qualified juries" are more punitive. "[I]t is self-evident", Witherspoon v. Illinois, 391 U.S. 510, 518 (1968), yet Buchanan cites numerous studies confirming this tilt towards more harsh punishment of the criminal offender.[8] Respondent dismisses "the scientific studies" with a wave of the hand as "besides the point" [RB 26]. Perhaps, but respondent chooses to ignore the point altogether. Precisely as Witherspoon and Adams v. Texas, 448 U.S. 38 (1980) defined juror impartiality, so too Buchanan defines it. As McCree stated, "both

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[8] "Social scientists are sometimes accused of laboriously demonstrating the obvious." Zeisel, Some Data on Juror Attitudes Towards Capital Punishment at vii (University of Chicago Monograph) (1968), filed herein [TR 270].

Witherspoon and Adams dealt with the special context of capital sentencing, where the range of jury discretion..." is wide. Here, although not capital, the jury had unbridled sentencing discretion.[9] McCree distinguished Witherspoon and Adams because of a difference between guilt and punishment decisions. Thus, Witherspoon and Adams clearly control this case. Buchanan's jury was unconstitutionally "stacked" on punishment, at least[10]. Witherspoon, 391 U.S. at 523.

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[9]In Kentucky "[w]hen the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty..." KY. RULE CRIM. PROC. 9.84(1).

[10]In his dissent in Witherspoon, 391 U.S. at 541 n.1, Justice White declined to "wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for purposes of determining guilt." Petitioner also submits this is such as a case.

ii) Balancing of Interests

Since Buchanan does not seek to topple a practice deemed essential to the administration of the death penalty, the balancing of interests here is quite different than in McCree. Few, if any, would see much in "death-qualification" to recommend it -- when viewed in isolation. Difficult, time consuming and expensive, "death-qualification" is the only time citizens are cross-examined about religious or political beliefs in an American courtroom. Absent a compelling justification, such as was central to McCree, the equation is not the same. This is a different case.

B. SOCIAL SCIENCE RESEARCH

In Witherspoon this Court, "required no empirical data or evidence to convince it of this tendency to impose...[more punitive sentences] or to prove that such a jury was unrepresentative

in...sentencing..." Grigsby v. Mabry, 483 F.Supp. 1372, 1379 (E.D.Ark. 1980), aff'd, 637 F.2d 525 (8th Cir. 1980), on remand, 569 F.Supp. 1273 (E.D.Ark. 1983), aff'd, 758 F.2d 226 (8th Cir. 1985), rev'd sub nom, Lockhart v. McCree, 106 S.Ct. 1758 (1986). On the other hand, Buchanan has gone to great lengths to demonstrate the obvious.[11] Buchanan has proved his case.

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[11]Other studies of general interest are: Garcia and Griffitt, Evaluation and Recall of Evidence: Authoritarianism and the Patty Hearst Case. 12 JOUR. RESEARCH PERSONALITY 57 (1978) [high authoritarians recalled more prosecution evidence than defense evidence]; Gleason & Harris, Race, Socio-economic Status and Perceived Similarity as Determinants of Judgments by Simulated Jurors, 6 JOUR. APPLIED SOC. PSYCHOLOGY 186 (1976) [death penalty attitudes have some predictive value in non-capital cases]; Epstein, Authoritarianism, Displaced Aggression, and Social Status of the Target, 2 JOUR. PERSONALITY SOC. PSYCHOLOGY 585 (1965) [authoritarianism and punitiveness]; Mills & Bohannon, Character Structure and Jury Behavior: Conceptual and Applied Implications, 28 J. PERSONALITY & SOC. PSYCHOLOGY 662-67 (1980) [authoritarianism and conviction proneness];

(footnote continued)

C. WITHERSPOON AND ADAMS SHOULD NOT BE OVERRULED.

In Witherspoon, 391 U.S. at 320-521, the jury selection procedure "crossed the line of neutrality" and produced "a jury uncommonly willing" to impose the maximum sentence. In finding a violation of the Due Process Clause of the Fourteenth Amendment, Witherspoon considered both the "fair cross-section" and "impartiality"

Mills & Bohannon, Juror Characteristics: To What Extent Are They Related to Jury Verdicts, 64 JUDICATURE 22-31 (1980) [authoritarianism and conviction proneness]; Moran & Comfort, Scientific Juror Selection: Sex as a Moderator of Demographic and Personality Predictors of Impaneled Felony Juror Behavior, 43 J. PERSONALITY & SOC. PSYCHOLOGY, 1052-63 (1982) [authoritarianism and conviction proneness]; Tyler & Weber, Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?, 17 L. & SOC'Y REV. 21, 35 (1982) [authoritarianism and pro-death penalty views]; Werner, Kagehiro & Strube, Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?, 67 J. APPLIED PSYCHOLOGY 629 (1982) [authoritarianism and inadmissible evidence].

interests at stake. Witherspoon was reaffirmed in Adams.

The essence of Buchanan's argument [Subsection "D" of his brief, BB 25-26] was ignored by respondent and amici. Kentucky barely cites Witherspoon [RB 26 n.7] and Adams [RB 29] and declines to give them a deferential nod. Amici doesn't even go this far.

In essence, respondent and amici wish this Court to implicitly overrule Witherspoon and Adams. Buchanan, it is claimed, doesn't have a constitutional leg to stand on. "[S]ince no specific guarantee of the Bill of Rights[12] has

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[12]Amici's argument that Buchanan must point to a specific constitutional prohibition against the practice of "death-qualification" begs the question. It is unclear whether the practice was even used at the time the Federal Constitution was drafted. "It was never used in England, and it has not always been used in this country." Despite widespread use of the death penalty, "the
(footnote continued)

been violated, the Petitioner cannot contend that the Fourteenth Amendment imposes a bar..." [Brief of Amici Curiae, AB 12-13].

Respondent understandably relies upon McCree's statement that the "Sixth Amendment's fair cross-section requirement applies to jury venires, not petit juries themselves" [RB 14]. Assuming the Court is unwilling to reconsider

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first reported use of death-qualification was in 1820, United States v. Cornell, 25 F.Cas. 650 (C.C.D.R.I. 1820) (No. 14, 868), and after that the practice caught on only gradually." Ardia McCree's Brief for Respondent at 25. The earliest Kentucky case is Smith v. Commonwealth, 37 S.W. 586 (Ky. 1896), permitting elimination of jurors who could not convict of a capital offense -- a type of juror not in issue here. See Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of a Fair Trial on Issue of Guilt?, 39 TEX.L.REV. 545, 566-7 n.92 (1961).

this approach,[13] Buchanan still must prevail because the significant "fair cross-section" interests at stake can still be considered under the Due Process Clause of the Fourteenth Amendment.

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[13]Buchanan does not retreat from his claim that such a bright-line rule is unfair and unduly focuses on form rather than substance. In the Hall of Justice in Jefferson County, Kentucky, where this trial took place, the jury panel is dispatched from one large room to individual courtrooms. Is it reasonable to conclude that systematic exclusion is constitutional if it occurs in individual courtrooms but unconstitutional if it takes place down the hall in the main jury pool room?

In Meyer v. Commonwealth, 472 S.W.2d 479 (Ky. 1971), another Jefferson County capital case, veniremembers were excused before they reached the individual courtroom in question if they were "opposed" to capital punishment. Under respondent's fair cross-section analysis, (the problem of "distinctiveness" aside) did this constitute a potential Sixth Amendment violation? If so, how can the location of the room where the question was asked be the governing principle?

Second, the explicit guarantee of an "impartial jury" as found in the Sixth Amendment seems quite specific. Under the "totality of the circumstances", Buchanan has been denied due process of law.

D. STATE INTEREST

It is obvious that "death-qualification" need not occur in non-capital cases. Cf. Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). This is what Buchanan seeks, nothing more. The cataclysmic scenarios painted by respondent and amici do not withstand scrutiny.

Neither respondent nor amici challenge petitioner's argument that a decision in his favor would result, at worst, in a separate trial for one non-capital co-defendant every few years in Kentucky [BB 26-27 n.43]. There is no reason to believe the situation is any different

elsewhere as the dearth of cases on point indicates.[14]

The state is free, of course, to not "death-qualify" the jury at a joint capital/non-capital trial or to employ one or another of the five options described in Buchanan's original brief -- a non-unanimous jury recommendation, a less-than-twelve member jury, simultaneous juries, a separate sentencing jury for the capital defendant or substitution of "death-qualified" alternates. Some of these options

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[14]If Buchanan's tendered distinction built around non-capital jury sentencing is deemed important, any decision could be limited to the handful of jury sentencing states: Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, Texas and Virginia. III American Bar Association Standards for Criminal Justice: Sentencing Alternatives and Procedures, Sec. 18-1.1, Commentary at 20 n.16 (2nd Ed. 1980).

require little or no additional cost.[15] Some satisfy respondent's [RB 28] and amici's [AB 7] purported concern for "consistency"[16] very nicely.

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[15]In his dissent in Witherspoon, 391 U.S. at 542 n.2, Mr. Justice White stated:

> The States should be aware of the ease with which they can adjust to today's decision... replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois Legislature through the procedure struck down today.

[16]Amici's claim that an adverse decision will cause prosecutor's to seek the death penalty "against...undeserving defendant[s]" hardly evidences a concern for "consistency" [AB 8].

At any rate, the "consistency" referred to is only a factor where the jury sentences and this interest would be better served if all non-capital homicide defendants were tried before neutral juries -- instead of everyone but Buchanan.

Respondent and amici ignore these suggested alternatives and rephrase the case as presenting only the issue of whether there is to be "an additional theory of constitutionally required severance" [AB 11]. If the states wish to choose the most costly remedy, they may. However, there is no need to do so. The choices are many -- and should be left to the states. Cf. Batson, 106 S.Ct. at 1724 n.24.

Amici's more hysterical warnings "...endless post-trial second guessing..." [AB 9] and respondent's hyperbolic "severance of capital and non-capital charges in all cases..." [RB 28] deserve little comment. The former concern can easily be remedied since no inquiry is needed in even arguable capital prosecutions. In most states, like Kentucky, such complaints are

already heard prior to trial anyway[17]. See, e.g., Smith v. Commonwealth, 634 S.W.2d 411 (Ky. 1982); State v. McCrary, 478 A.2d 339 (N.J. 1984). The latter fear is, with due respect, silly. It ignores the crucial nature of the state interest discussed in McCree - the right to seek the death penalty before a single jury.

E. ONE-SIDED, INADEQUATE "PUNISHMENT QUALIFICATION"

In his brief below, respondent argued that Buchanan failed to show that his jurors were unable "to consider the full range of punishment" [CB 6]. In fact, Buchanan was not permitted to do so. Continuing, respondent pointed out:

> In many instances an individual does not even realize his position on the matter unless and until he is summoned for jury service in a capital case, and

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[17]Contemporaneous objections are necessary and it is difficult to imagine a capital defendant objecting if the prosecutor decides to withdraw his request for the death penalty.

> often times remains uncertain... throughout the voir dire process [CB 6].

Restrictive, judge conducted "death-qualification" which only probes views on a punishment (death) irrelevant to the accused's case and not on relevant punishments (20 years to life) violates due process of law. This is true even assuming the exclusion meets the Witt/Witherspoon standard. Here there is no guarantee of that as the judge's uniform inquiry did little to unearth the shifting views respondent speaks of.

Apparently conceding the flawed nature of the "death-qualification" process in this trial, respondent claims this Court should ignore this fact because on appeal Buchanan mounted an attack on death-qualification itself - rather than on how it was done in this particular trial. Petitioner submits the real reason is that it is

extraordinarily difficult to defend such a lopsided method of picking those who will dispense justice...and mercy.

II.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCES OF LAW AND THE FIFTH AND SIXTH AMENDMENTS WHERE EVIDENCE OBTAINED FROM A POST-ARREST JUVENILE COURT/INVOLUNTARY COMMITMENT/ COMPETENCY EVALUATION WAS USED AGAINST HIM AT TRIAL.

A. FACTS

Respondent's counter-statement of the case [RB 7-12] reinterprets the facts in evidence in order to imply that David Buchanan was more involved - even then at most a bystander when the deceased was shot - or more callous (Buchanan "boasted..."[18]) than previously contended. Having conceded in the trial court, and before the jury,

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[18]In the Commonwealth's brief below at 8, petitioner "told" - which now has became a "boast" [RB 9].

that Buchanan was at best involved in a "conspiracy to commit the robbery.." [Transcript of Evidence, TE 1336], this approach seems disingenuous.

Vaguely referring to the testimony, respondent blurs the issue of the evidentiary support for an intentional murder and boldly claims any error is harmless. How, one might ask, can a constitutional error be harmless as to an intentional murder conviction when the prosecutor concedes before the jury that the proof of intentional murder is lacking?[19]

B. CONFUSION BY AMICI

Amici claim that Buchanan "selectively offered only those portions [of the pre-crime psychologial reports] which would support his

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[19]The Kentucky Supreme Court described this evidence as only "sufficient." Buchanan, 691 S.W.2d at 212 [A 83].

defense of extreme emotional disturbance" [AB 14]. Amici is wrong. Defense counsel had the witness read the entire reports, containing both "favorable" and "unfavorable" information, to the jury [A 39-41, 43-45, 46-47]. There was no unfairness to the Commonwealth.

Amici claim that Dr. Noelker's (not Lange's) report "would have been admissible against the Petitioner to establish future dangerousness as an aggravating circumstance had the death penalty been sought" [AB 16]. First, quite obviously, the death penalty wasn't sought. Second, future dangerousness is not, and never has been, an aggravating circumstance in Kentucky. KY.REV.STAT. 532.020. Third, Buchanan introduced this report, including the "portions" relied upon by amici, so what is the point?

C. SCOPE OF JUVENILE COURT EXAM

Estelle v. Smith, 451 U.S. 454, 467, 471 (1981) places great emphasis on the accused's "awareness of the Fifth Amendment privilege and the consequences of foregoing it..." as well as the accused's need of "the guiding hand of counsel" in deciding whether to participate.

The supplemental brief by respondent suggests that it is critical that Buchanan's counsel knew in advance of the psychiatric examination by Dr. Lange and, in fact, moved the juvenile court for it.[20] Amici falsely imply that

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[20]This information was not of record during the appeal below. Upon Kentucky's request, Buchanan has stipulated what a review of the tapes of the juvenile hearing would show so that this Court is not misled as to what actually happened. Until these tapes were unearthed recently by respondent, it was assumed by both parties that the psychiatric examination in question was, as it appears to indicate [A 72-73], a court-ordered competency examination.

Buchanan had adequate "notice of the scope of the interrogation" [AB 21]. In fact, this examination was sought by defense counsel and the prosecutor to determine whether David was "amenable to treatment" [Transcript of Hearing, TH 12/18/81, 8] and not for competency or to build an insanity defense. "This is a joint motion for a psychiatric evaluation... [T]he child is a committed ward of the state... [The defense contends] the child may be amenable to treatment"[21] [Transcript of Juvenile Court

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[21]Defense counsel's motive in requesting this examination may have been to get Buchanan some psychiatric treatment during his long wait in jail. It must be remembered that petitioner was released to the streets shortly after the Commonwealth decided he needed "treatment" [A 67]. Afterwards, the circuit judge sent petitioner to Kentucky's psychiatric center twice [R 396, TR 377]. "Keep as long as he needs treatment" [TR 126].

Another apparent purpose, perhaps shared by both
(footnote continued)

Tapes,[22] TJT 1,2]. Neither counsel nor the Court requested a competency examination. Dr. Lange reported on Buchanan's competency on his own initiative. "I was not asked to comment on competency" [TJT 9].

Respondent's thrust that Buchanan's only complaint is that he did not "obtain the desired diagnosis" [RB 47] is grossly misleading.

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parties, was to determine whether petitioner was a juvenile who was reasonably likely to be rehabilitated "by the use of procedures, services, and facilities currently available to the juvenile justice system." KY.REV.STAT. 208.170(3).

At any rate, this was a "joint" motion as amici [AB 17] and respondent [RB 42] admit.

[22]One of the juvenile hearing tapes has now been transcribed by respondent and is referred to by Kentucky [RB 43] and amici [AB 18] in their briefs, although the transcript is not of record. Since opposing counsel have relied on these tapes, in fairness petitioner must also.

to treatment" [R 357]. Second, the "desired diagnosis" would not have helped in an adult criminal trial at all. No insanity defense was ever intended or suggested. "The results of that inquiry were used for **a much broader objective that was plainly adverse to**" Buchanan. Smith, 451 U.S. at 465. "[A] heavy burden rests on the government to demonstrate that the defendant **knowingly and intelligently** waived his privilege against self-incrimination..." Miranda v. Arizona, 384 U.S. 436, 479 (1966). "Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the Fifth Amendment's protection." Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981). "[N]either defense counsel's advance approval of a psychiatric examination nor his request for a psychiatric examination waives these constitutional rights." Cape v. Francis, 741 F.2d 1287, 1295 n.9 (11th

Cir. 1984); see Witt v. Wainwright, 714 F.2d 1069, 1075-76 (11th Cir. 1983), rev'd on other grounds, Wainwright v. Witt, 105 S.Ct. 844 (1985).

Smith did not hinge on whether defense counsel were "notified in advance" of the psychiatric examination but whether they were accurately "notified in advance [what issues] the psychiatric examination would encompass..."[23] Smith, 451 U.S. at 471.

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[23]There was some suggestion in Smith, 451 U.S. at 459 n.5, that defense counsel knew, in advance, of the psychiatric examination.

D. LEGITIMATE REBUTTAL?

i) The Psychological Reports Introduced by Buchanan were Obtained by the Commonwealth Prior to the Crime

Kentucky and amici contend that "[s]uch defendants should not be allowed to use the Fifth Amendment privilege as a shield to distort the truth..." [RB 41 n.15]. Rebuttal evidence is needed "to rectify any incomplete impressions...", otherwise the "Fifth and Sixth Amendments would insulate" a mental state defense from challenge [AB 20]. This argument might have some force in another case with different facts...but not here.

Harris v. New York, 401 U.S. 222, 226 (1971), was premised upon the legitimate concern that the Fifth Amendment not "be construed to

include the right to commit perjury."[24] This interest is not even remotely implicated here.

Whatever may be said for the need to protect the prosecution's right to develop mental state evidence to rebut a mental state defense[25]

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[24]Harris's "testimony...contrasted sharply with what he told police..." 401 U.S. at 226. He was impeached "on matters directly related to the crimes for which he was on trial." 401 U.S. at 228 (dissent).

[25]Kentucky law requires notice of an insanity defense and protects the prosecutor's right to obtain a psychiatric examination prior to trial. KY.REV.STAT. 504.070. This right has never been expanded to apply to the issue of "extreme emotional disturbance." Thus, as a matter of Kentucky law, the prosecution's interest in obtaining "rebuttal" evidence on the defendant's emotional state is considerably less than in situations where the defendant's sanity is in issue.

Furthermore, as claimed by respondent, "the state could have properly compelled petitioner to submit to examination by an independent psychiatrist" [Supplemental Brief for Respondent,

(footnote continued)

when a defense expert is retained or appointed is beside the point. The only proof offered by David Buchanan was developed by the Commonwealth and prior to the crime.[26] That the prosecutor was unhappy with the evidence is not of constitutional moment. The simple fact is that in this case there was no defense evidence manufactured on mental state issues which, in fairness, calls for rebuttal -- even had the Commonwealth decided to obtain legitimate, relevant rebuttal.

SB 4]. **But Kentucky choose not to do so!** Instead, as discussed infra in Sec. II D(ii), the prosecutor took a psychiatric report on an irrelevant issue and misused it.

[26]The reliability of pre-crime psychological evaluations obtained by Commonwealth employees is beyond dispute.

ii) Lange's Report was Irrelevant to the Issue Before The Jury and Grossly Misleading

Dr. Lange testified "the examination was limited in purpose" [TJT 6] and that the [KY. REV. STAT.] 202[A] criteria[27] involves someone being "put into a treatment setting...against their will... I do not see that he meets that criteria. That's not to say...that there are no problems...but...as far as...an involuntary commitment - I did not feel that he meets the criteria..." [TJT 29]. The "only thing that I was really looking at" was "the need for involuntary psychiatric commitment..." [TJT 38]. None of this, including Dr. Lange's volunteered opinion

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[27] KY. REV. STAT. 202A.026(2) requires that the person "reasonably benefit from treatment..." The "whole question" is whether someone needs "intensive in-patient...psychiatric treatment..." [TJT 30]. Buchanan didn't, according to Dr. Lange. This issue was irrelevant to "extreme emotional disturbance."

on competency, has anything to do with "extreme emotional disturbance." Simply stated this is not legitimate rebuttal evidence. Dr. Lange:

> I am not in the position to make expert testimony on [criminal responsibility] ...because I don't think that's within my purview... that would be [a] whole different set of criteria - nothing to do with whether he needs to have his freedom removed in order to undertake psychiatric treatment [TJT 39].

The juvenile court did not request Dr. Lange "to provide a full-blown psychiatric interview...dealing with any character disorder or emotional disturbance" [TJT 43]. Dr. Lange later stated: "I do not feel as an expert witness I was prepared to give expert testimony on something I was not asked to evaluate" [TJT 44]. Unfortunately, in adult court the prosecution voluntarily chose to forego insisting on a relevant psychiatric examination and, instead, decided to misuse Dr. Lange's evaluation under

the guise of rebuttal[28]. This violates due process.

Writing for the Court in United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984), Judge Scalia phrased the issue well:

> It seems to us at best a fiction to say that when the defendant introduces his expert's testimony he "waives" his Fifth Amendment rights...it is doubtful whether such a "waiver" could meet the high standard required for a voluntary, "free and unconstrained"...relinquishment of the Fifth Amendment privilege...

The real issue is whether denying rebuttal would have an "unreasonable and debilitating effect...upon society's conduct of a

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[28]The prejudice now appears even greater than petitioner previously believed. The transcript clearly shows that the use of Dr. Lange's report in circuit court was tantamount to use of false evidence. The actual meaning of the report, as the transcript now makes clear, did not remotely resemble the use the prosecutor made of it. Therefore, petitioner's inability to confront Dr. Lange now appears to be crucial. SIXTH and FOURTEENTH AMENDS., U.S. CONST.

fair inquiry into the defendant's culpability..." Id. The answer here is a ringing: "No!"

Harris v. New York, 401 U.S. at 225, did not involve any claim that the statements were "involuntary" or that Harris was misled. In fact, the "trustworthiness of the evidence [must] satisf[y] legal standards." See also Oregon v. Hass, 420 U.S. 714, 722 (1975). The opposite is true here. Neither David Buchanan or his lawyer knew, or could reasonably have known, the purpose to which his statements to Dr. Lange were to be put. In this sense, petitioner's cooperation with Dr. Lange was involuntary...not the **"product of a rational intellect and a free will..."** Blackburn v. Alabama, 361 U.S. 199, 208 (1960). "Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial." Mincey v. Arizona, 437

U.S. 385, 403 (1978). This means even in rebuttal.

E. INTRODUCTION OF JUVENILE COURT, CIVIL COMMITMENT AND/OR COMPETENCY EXAMS BY A PSYCHIATRIST, WHEN IRRELEVANT TO CRIMINAL RESPONSIBILITY, DENY DUE PROCESS OF LAW

The American Bar Assication Standards prohibit use of "any information" provided to "any person evaluating or providing mental health ...services... [A]ny information derived therefrom and any testimony of experts or others ...should be considered privileged...and should be used only in a proceeding to determine the defendant's competence to stand trial and related treatment or habilitation issues." Information elicited in a competency examination is only permitted in rebuttal when the defendant uses "the report or parts thereof for any other purpose." II American Bar Association Standards for Criminal Justice: Mental Health Standards, Sec. 7-4.6 (2nd Ed. 1980). Buchanan made no

attempt to use Dr. Lange's report. Thus, the "critical balancing of...interests" in the ABA Standards (Commentary) was not violated by petitioner.

Buchanan urged in his original brief that this Court should bar, under the Due Process Clause, use of court-ordered competency examinations to rebut mental state defenses because "references that are irrelevant and are elicited in bad faith" may deny the defendant a fair trial [BB 42-44]. United States v. Fortune, 513 F.2d 883, 888-889 (5th Cir. 1975). This case is a perfect example of this problem. "[C]riminal responsibility...is qualitatively different from competency...[29]" Cape v. Francis, 741 F.2d at

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[29] See 18 U.S.C. Sec. 4244, which states, in relevant part "[a] finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea
(footnote continued)

194; see Battie v. Estelle, 655 F.2d at 700-701. And so are different the other purposes of Dr. Lange's psychiatric exam: involuntary commitment and/or "amenability to treatment."

KY. REV. STAT. 202A.026, permitting involuntary hospitalization, is a civil proceeding. Psychiatric examinations can be compelled. Cf. Addington v. Texas, 441 U.S. 418 (1979). Likewise, juvenile court psychiatric examinations, such as this one, on "amenability to treatment" may be compelled. Juvenile proceedings "are 'civil' in nature and not criminal..." Kent v. United States, 383 U.S. 541,

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of insanity as a defense...such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury." See United States v. Davis, 496 F.2d 1026, 1029 (5th Cir. 1974), where a competency finding was brought to the attention of an "insanity defense jury." The court found "plain error" being "lead inescapably to the conclusion that Davis' right to a fair trial...was prejudically affected."

555 (1966). As such, Estelle v. Smith may not apply when the purpose of the psychiatric exam is "treatment." See Allen v. Illinois, 106 S.Ct. 2988, 2995 (1986). But an entirely different question is presented when "the privilege claimant" objects "against his compelled answers in any subsequent criminal case." 106 S.Ct. at 1995. Unlike the usual situation, "requiring the privilege against self-incrimination in... [later criminal] proceedings would...advance reliability" rather than thwart it. 106 S.Ct. at 2995. Often, as in this case, competency, commitment and/or treatment examinations are irrelevant to criminal responsibility and serve only to mislead the jury. Yet, the examinations themselves are essential for other reasons.

F. EXTREME EMOTIONAL DISTURBANCE/ BURDEN OF PROOF

A "major premise" [RB 31] of respondent's brief is a lengthy discussion [RB

31-38] of an important issue in Kentucky criminal law, but seemingly of little impact here - whether the mitigation element of "extreme emotional disturance" [EED] is an element of murder or an affirmative defense? Absent an understanding of why this is crucial, Buchanan will not reenter this fray.

G. HARMLESS ERROR?

The holding of the Kentucky Supreme Court that "[t]here is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance", and thus any error was harmless, is wrong and suspect. Buchanan, 691 S.W.2d at 212 [A 83]. First, the Court actually relies upon the objectionable report in making this calculation. "There was also evidence of Buchanan's August 17, 1981 competency report..." 691 S.W.2d at 213 [A 83]. Second, the EED evidence was judged under a

revised standard announced long after the crime and the trial. Wellman v. Commonwealth, 694 S.W.2d 696 (Ky. 1985). See Hale v. Commonwealth, ___ S.W.2d ___ (Ky. 1986).

Finally, as argued supra in Sec. II A, the prosecutor conceded there was insufficient evidence of intentional murder by David Buchanan. His gross misuse of Dr. Lange's report and accusation that defense counsel concealed it [TE 1309] certainly contributed to the guilty verdict of intentional murder and maximum sentence.[30] The

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[30]Kentucky's unique procedure of jury sentencing must be accounted for in any harmless error analysis. In Abernathy v. Commonwealth, 439 S.W.2d 949, 953 (Ky. 1969), the Kentucky Supreme Court described the ingredients in a harmless error analysis under Kentucky procedure:

> Necessarily, one important circumstance in determining whether a particular error was prejudicial is the weight of the evidence. Another is the amount of punishment fixed by the verdict, especially with regard to the

(footnote continued)

Commonwealth cannot carry its burden demonstrating that this misuse of unconstitutional evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

For all the reasons stated here and in Buchanan's original brief, petitioner respectfully requests that the decision of the Kentucky Supreme Court in his case be reversed.

Respectfully submitted,

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allowable minimum and maximum (emphasis added).

See also Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).

CERTIFICATE OF SERVICE

I hereby certify that copies of this Reply Brief have been mailed, first class postage prepaid, to David A. Smith and C. Lloyd Vest, II, Assistant Attorney Generals, Capitol Building, Frankfort, Kentucky 40601-3494 and David W. Lee and Susan Stewart Dickerson, Assistant Attorney Generals, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this the 24th day of December, 1986.